STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 129035

Court of Appeals
No. 252188

Circuit Court
No. 03-189882-FH

-vs-

CHARLES WAYNE FRANCISCO,

Defendant-Appellant.
_____/

129035

APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

This Court entered an order (Appendix A) on December 7, 2005, directing the Clerk of this Court to schedule oral argument on the Defendant-Appellant's application for leave to appeal from an unpublished opinion of the Court of Appeals (Appendix B) entered on May 26, 2005. The opinion of the Court of Appeals affirmed the Defendant-Appellant's convictions of First Degree Home Invasion, MCL 750.110a, and as a Habitual Offender, Third Offense, MCL 769.13, and his sentence of 8 ½ to 40 years for those offenses in Oakland County Circuit Court. The order of this Court directed the parties to file supplemental briefs addressing:

> "(1) whether *People v McDaniel*, 256 Mich App 165, 172-173 (2003), was correct in deciding that OV 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense, and (2) assuming OV 13 should not have been scored, is defendant automatically entitled to resentencing because of the scoring error, or is resentencing unnecessary because the minimum sentence imposed was 'within the appropriate guidelines sentence range' within the meaning of MCL 769.34(10)."
>
> People v Francisco, ____ Mich ___ (2005).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY DECIDED IN PEOPLE V MCDANIEL, 256 MICH APP 165; 172-173 (2003) THAT OFFENSE VARIABLE 13 MAY BE SCORED BASED ON THREE OR MORE FELONIES COMMITTED IN ANY FIVE-YEAR PERIOD EVEN IF THAT PERIOD DOES NOT INCLUDE THE DATE OF THE SENTENCING OFFENSE?

The Court of Appeals answered this question "Yes."

The Circuit Court answered this question "Yes."

Defendant-Appellant answers this question "No."

Plaintiff-Appellee answers this question "Yes."

II. WHETHER ANY ERROR IN THE SCORING OF OFFENSE VARIABLE 13 WAS HARMLESS IN NATURE AND A RESENTENCING IS UNNECESSARY BECAUSE THE MINIMUM SENTENCE IMPOSED BY THE TRIAL COURT WAS "WITHIN THE APPROPRIATE GUIDELINES SENTENCE RANGE" WITHIN THE MEANING OF MCL 769.34(10)?

The Court of Appeals was not asked to answer this question.

The Circuit Court was not asked to answer this question.

Defendant-Appellant answers this question "No."

Plaintiff-Appellee answers this question "Yes."

COUNTER-STATEMENT OF FACTS

Defendant-Appellant Francisco was charged in Oakland County Circuit Court with the offenses of First Degree Home Invasion, MCL 750.110a(2), Larceny In A Building, MCL 750.360, and as a Habitual Offender, Third Offense, MCL 769.13. The Defendant was alleged to have committed the charged offenses on April 4, 2003, in Orion Township. The Defendant's case was assigned to Oakland County Circuit Court Judge Rudy J. Nichols. The Defendant's jury trial commenced on September 18, 2003, with Judge Nichols presiding. A co-defendant, Charles Bernier, was tried at the same time before a different jury. On September 23, 2003, the jury found the Defendant guilty as charged of First Degree Home Invasion and Larceny In A Building. (T of 9/23/03, 6-7). The Defendant acknowledged that he had two prior felony convictions. (T of 9/23/03, 10-11). The Defendant's sentencing was set for October 17, 2003. The Presentence Information Report recommended a minimum sentence of between 78 and 195 months. Defendant objected to the scoring of Offense Variable (OV) 13 at 25 points. (T of 10/17/03, 4-7). The trial court sentenced the Defendant as a Habitual Offender, Third Offense, to a term of 8 ½ years (102 months) to 40 years imprisonment. (T of 10/17/03, 7). A copy of the Presentence Report including the Sentencing Information Report is attached to this brief as Appendix C.

The Defendant appealed as of right to the Court of Appeals. The Court of Appeals affirmed the Defendant's convictions and sentence in an unpublished opinion (Appendix B) entered on May 26, 2005. The Defendant filed an application for leave to appeal with this Court. On December 7, 2005, this Court entered an order (Appendix A) which directed the clerk of this

Court to schedule oral argument concerning the Defendant's application for leave to appeal and directed the parties to file supplemental briefs concerning the issue of OV 13.

In the Defendant's trial, the People called Ms. Joanne Ortiz as their first witness. Ms. Ortiz testified that she and her three children lived in a trailer at 9 Swallow Court in Orion Township in Oakland County. Ms. Ortiz did not work as she was on disability. (T of 9/18/03, hereafter T-I, 72-73). On April 4, 2003, Ms. Ortiz's friends Sheila Mendoza and Rhonda Farmer came to her trailer around 10 p.m. Ms. Ortiz's children were also home. The group was playing Yahtzee and cards. (T-I, 73-75). Angela Tucker, an acquaintance of Ms. Ortiz, came to the trailer around 11 p.m. with a laptop computer that she wanted to sell. Ms. Tucker lived in a trailer two streets away from Ms. Ortiz's trailer. (T-I, 75-77). No one bought the computer because there was a code and difficulty accessing the computer. Ms. Tucker left after about 20 minutes. (T-I, 78-79).

Ms. Ortiz testified further that around 2 a.m., Ms. Tucker telephoned and asked if she could come and get some cigarettes and Ms. Ortiz told her that she could. Ms. Mendoza and Ms. Farmer were still in the trailer. Ms. Tucker came over and got some cigarettes. As Ms. Tucker got ready to leave, she unlocked the door, stepped back and two guys ran into the trailer. (T-I, 79-81; 112) The men had on dark clothing, masks and gloves. One of the men had a handgun. One of the men said to Ms. Ortiz to sit the fuck down or I'll kill you bitch. (T-I, 82). Ms. Ortiz did not know who the men were. The men were white men. The men took the purses of Ms. Ortiz and Ms. Farmer. Angela Tucker was standing back watching. The men never looked at Ms. Tucker. After the men left, Ms. Ortiz said to Ms. Tucker why did you set me up. (T-I, 83-88). Ms. Tucker said that she had nothing to do with it. Ms. Ortiz called the police and Ms. Farmer socked Ms. Tucker. (T-I, 88-89).

Ms. Ortiz testified further that officers arrived from the Oakland County Sheriff's Department. Ms. Ortiz's purse had contained her checkbook, her medications, her cell phone and her cigarette case. Ms. Ortiz's Bridge Card for food stamps was in her cigarette case. Ms. Ortiz eventually received the majority of her possessions back from the Sheriff's Department. (T-I, 89-90). Ms. Ortiz's son and daughter chased the masked men when they left the trailer. (TI, 146).

Deputy Ernie May of the Oakland County Sheriff's Department testified that on April 4, 2003, he transported the Defendant Charles Francisco from the Orion Township substation to the Oakland County Jail. Prior to placing the Defendant in his police car, Deputy May patted the Defendant down for his safety. Deputy May found a Michigan Bridge Card in the left rear pocket of the Defendant's jeans. The Bridge Card had Joanne Ortiz's name on it. Deputy May turned the Bridge Card over to Detective Selling. (T of 9/19/03, hereafter T-II, 5-10).

Ms. Kristen Alexander testified that she was 19 years old and lived with her father in Chateau Orion trailer park. Joanne Ortiz and Angela Tucker lived in the same trailer park. (T-II, 20-21). Ms. Alexander often babysat for Ms. Tucker's five children and was good friends with Ms. Tucker. Ms. Alexander was in Ms. Tucker's trailer around 7 p.m. on April 4, 2003. The Defendant Charles Francisco and Chris Bernier came to the trailer and were talking and hanging out with Ms. Tucker and Ms. Alexander. Ms. Alexander had met the Defendant before a couple of times at Ms. Tucker's trailer. (T-II, 22-25). When the Defendant and Bernier arrived at the trailer, they had a laptop computer with them. (T-II, 26). The Defendant asked Ms. Tucker to try to sell the computer and Ms. Tucker took it to Joanne Ortiz's trailer around 11 p.m. Ms. Tucker came back to the trailer in about half an hour and hadn't sold the computer. (T-II, 27-28).

Ms. Alexander testified further that after awhile, Ms. Tucker left the trailer saying that she was going to buy a Vicodin from Ms. Ortiz. The Defendant and Chris Bernier also left Ms.

Ms. Alexander testified further that after awhile, Ms. Tucker left the trailer saying that she was going to buy a Vicodin from Ms. Ortiz. The Defendant and Chris Bernier also left Ms. Tucker's trailer saying that they were going out to buy cigarettes. (T-II, 30-31). Ms. Alexander laid down for awhile and Ms. Ortiz's daughter Danielle and a young man, whose nickname was Butterball, came busting into the trailer and wanted to know where the two white guys were who had been with Ms. Tucker. Butterball was the boyfriend of Joanne Ortiz's daughter, Jade. (T-III, 93-94). After Danielle and Butterball left, Ms. Tucker returned to the trailer and was very scared. Ms. Tucker told Ms. Alexander what had happened. (T-II, 32-33). Ms. Alexander went to a different part of the trailer and was laying down with Ms. Tucker's children. Ms. Alexander heard the voices of the Defendant and Chris Bernier. They were saying they didn't know what to do or where to go because they had messed up. (T-II, 34-35).

Ms. Alexander testified further that she came out of the bedroom and didn't see Ms. Tucker, the Defendant or Chris Bernier. Ms. Alexander went into the bathroom and when she came out, officers from the Sheriff's Department were in the trailer talking with Ms. Tucker. (T-II, 36). The officers searched the trailer and found the Defendant and Chris Bernier in bedrooms. After the officers left the trailer, Ms. Alexander found two purses in a garbage bag in the dryer (T-II, 37-40) and a wet pair of black Adidas shoes. Ms. Alexander also found one wet glove in the back bedroom where Chris Bernier was found by the police. It was raining that evening. (T-II, 43). The Defendant had been wearing a big black coat that evening and Bernier had a leather coat. (T-II, 43).

Ms. Angela Tucker testified that she was 29 years-old and lived with her five children in a trailer at 21 Eagle Vista in Orion Township. Ms. Tucker was friends with Joanne Ortiz who lived in the same trailer park with her two daughters, Danielle and Jade. (T-II, 97-100). The

trailers of Ms. Tucker and Ms. Ortiz were about a two minute walk away from each other. (T-II, 101). On Friday, April 4, 2003, the Defendant Chuck Francisco and Chris Bernier stopped by Ms. Tucker's trailer around 11 p.m. The Defendant and Bernier were friends of Lee Hodges who was Ms. Tucker's boyfriend at the time. The Defendant and Bernier were referred to as an uncle and nephew. (T-II, 101-105). It was cold and rainy that evening. (T-II, 106). The Defendant had a laptop computer that he wanted to sell for $200. Ms. Tucker took the computer over to Joanne Ortiz's trailer, but they couldn't get access to the computer because they didn't have a pass code. Two women named Sheila and Rhonda were in the trailer with Joanne Ortiz. (T-II, 107-108). Ms. Tucker felt the computer had been stolen when they couldn't get access to it. (T-II, 108-109). When they couldn't get access to the computer, Ms. Tucker went back to her own trailer.

Ms. Tucker testified further that a few minutes after she returned to her trailer, Ms. Ortiz called and asked her to take some baking soda to Ms. Ortiz. Ms. Tucker took baking soda to Ms. Ortiz and received a Vicodin pill in return. (T-II, 112). After Ms. Tucker returned to her trailer, she went back again to Ms. Ortiz's trailer to purchase a Vicodin pill for the Defendant. As Ms. Tucker opened the door to leave Ms. Ortiz's trailer, someone hit her in the back of the head and she fell to the floor. (T-II, 113-115). Two men in dark clothing with their faces covered ran into Ms. Ortiz's trailer with what looked like a gun. The two men told the women to get down. The men left with at least one purse. (T-II, 115-117). Danielle and Butterball ran after the two men. Rhonda accused Ms. Tucker of setting them up for the two men. Ms. Tucker didn't know who the men were. Ms. Tucker did not set the other women up. (T-117). Rhonda hit Ms. Tucker on the cheek. The women told Ms. Tucker to go home and get their stuff. (T-II, 118).

Ms. Tucker testified further that when she arrived back to her trailer, Danielle and Butterball were leaving it. When Ms. Tucker went into the trailer only Kristen Alexander and

Ms. Tucker's boyfriend Lee Hodges were there. (T-II, 118-119). Around 2:30 a.m., the Defendant and Chris Bernier appeared in wet black clothes and were carrying two purses. Ms. Tucker told them that they had to leave because the cops were going to be there. (T-II, 119-121). The Defendant and Bernier went into the back bathroom and took off some of their wet clothes. (T-II, 121). They put the purses in a garbage bag and put the bag in the dryer. (T-II, 122). The police arrived and asked if there was anybody else in the trailer and Ms. Tucker lied and answered no because she was scared. (T-II, 125). The police found Chris Bernier and the Defendant and arrested them. (T-II, 126-127). Kristen Alexander found some of the things discarded by the Defendant and Bernier. (T-II, 127). Ms. Tucker told the police the truth when she was taken to the police substation. (T-II, 128-129).

Ms. Sheila Mendoza testified that on April 4, 2003, she and her sister Rhonda went to visit their friend Joanne Ortiz at her trailer. Angela Tucker came to the trailer and wanted to sell a laptop computer to Sheila, but Ms. Tucker did not have a password to gain access to the computer. (T-III, 51-53). Ms. Tucker saw that Sheila had money from her paycheck in her purse. (T-III, 55). Ms. Tucker came back to the trailer later to get some cigarettes and was stalling by the door. Ms. Tucker opened the door and two men dressed in dark clothing rushed in. One of the men held his hand as if he had a gun. The men's faces were covered. Sheila threw her purse behind her. The men took the purses of Joanne and Rhonda and left. Angela Tucker also took off. (T-III, 53-58). Joanne Ortiz called the police who came to the trailer.

Lieutenant William Kuyck of the Oakland County Sheriff's Department testified that on April 4, 2003, at 2:20 a.m., he was dispatched to 9 Swallow Court in Orion Township concerning a break-in and armed robbery. After talking with the people at the trailer, Lt. Kuyck and other officers went to the trailer of Angela Tucker. After speaking with Ms. Tucker, Mr. Hodges and

Ms. Alexander, the officers did a safety sweep of the trailer. (T-III, 84-87). The officers found Chris Bernier in one bedroom and the Defendant Charles Francisco in a different bedroom. It had been raining hard that night and there was wet clothing in a bathtub. Ms. Alexander subsequently gave to Lt. Kuyck a bag containing other evidence concerning the robbery. Lt. Kuyck turned the evidence over to Detective Tom Selling. (T-III, 87-91).

Detective Tom Selling of the Oakland County Sheriff's Department testified that he was the detective assigned to this case. Det. Selling received a telephone call at home and responded to the Orion Township substation where he interviewed Angela Tucker. (T-III, 117-118). Det. Selling then went to Ms. Tucker's trailer where he recovered wet gloves, shoes and coats. Those items were admitted into evidence. (T-III, 118-139). Following the testimony of Det. Selling, the People rested. (T-III, 196).

Ms. Kathy Bernier testified that she was the sister of the codefendant, Chris Bernier. About two months before trial, she was called to the Oakland County Jail to pick up a box containing her brother's clothes. There were a pair of work boots, a black t-shirt and a pair of black sweatpants in the box. (T-III, 198-201). The Defendant Charles Francisco was the uncle of Chris Bernier and they hung out together. (T-III, 208-209).

Mr. Chris Bernier, Sr. testified that he was the father of the codefendant, Chris Bernier, Jr. Bernier, Sr. saw Bernier, Jr. around 4 p.m. on April 3, 2003, and Bernier, Jr. was wearing work shoes that belonged to his father. (T-III, 213-215).

The codefendant Chris Bernier testified as a witness in his own behalf. Bernier went to Angela Tucker's trailer with the Defendant so that the Defendant could talk to Lee Hodges about the Defendant's car. They went in the car of Bernier's father, which was overheating. Bernier's clothes got wet working on the car in the rain. (T-III, 223-226). Bernier took off his clothes and

underwear and gave him some pants there to wear. (T-III, 226-229). Bernier had no part in the home invasion. (T-III, 231).

Defendant Francisco recalled Det. Thomas Selling as a witness. Det. Selling testified that the pants worn by Bernier Jr. were soaked, but his work boots were dry. (T-III, 263-264). Following the testimony of Det. Selling, the Defendant and codefendant Bernier rested. (T-III, 266-267). The Defendant's motion for a directed verdict was denied by the trial court. (T-III, 272).

The assistant prosecutor and the attorneys for the Defendant and codefendant Bernier gave closing arguments before their own juries. (T-III, 275-277). After the closing arguments, the trial court instructed the Defendant's jury concerning the applicable law. (T-III, 298-313). The Defendant was satisfied with the instructions given to the jury. (T-III, 313). On September 23, 2003, the jury found the Defendant guilty as charged. On October 17, 2003, the trial court sentenced the Defendant as a habitual offender, third offense, to a term of 8½ (102 months) to 40 years imprisonment. (T of 10/17/03, 7).

A copy of the Defendant's Offender Profile obtained from the website of the Offender Tracking System of the Department of Corrections is attached to this brief as Appendix D. The Defendant's Offender Profile indicates that he was convicted of 3 counts of manslaughter in Oakland County Circuit Court in 1987. The date of the offenses was July 26, 1986, and the Defendant was sentenced to a term of 3 to 15 years imprisonment on May 11, 1987. While incarcerated, the Defendant was charged with felonious assault for an assault committed on August 17, 1987. The Defendant pleaded guilty to attempt felonious assault and was sentenced on May 6, 1988, to a consecutive sentence of 1 to 2 years imprisonment. The Defendant was discharged from the Department of Corrections on April 5, 2002, having served his maximum

on May 6, 1988, to a consecutive sentence of 1 to 2 years imprisonment. The Defendant was discharged from the Department of Corrections on April 5, 2002, having served his maximum sentences for his manslaughter and attempt felonious assault convictions. The Defendant committed the offenses for which he was convicted in this case on April 4, 2003.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED IN PEOPLE V MCDANIEL, 256 MICH APP 165; 172-173 (2003) THAT OFFENSE VARIABLE 13 MAY BE SCORED BASED ON THREE OR MORE FELONIES COMMITTED IN ANY FIVE-YEAR PERIOD EVEN IF THAT PERIOD DOES NOT INCLUDE THE DATE OF THE SENTENCING OFFENSES.

The Defendant contends that Offense Variable (OV) 13 was improperly scored in this case because the five-year period during which the Defendant was convicted of three felonies did not include the date of the sentencing offense. The Defendant preserved this issue in the trial court by objecting to the trial court's scoring of OV 13 at the time of his sentencing. (T of 10/17/03, 4-7). **The standard of review for a trial court's legal interpretation of the statutory Sentencing Guidelines is de novo review. People v Hegwood, 465 Mich 432; 436 (2001).** The People submit for the reasons set forth below that the decision of the Court of Appeals in People v McDaniel, 256 Mich App 165 (2003) was legally correct and that OV 13 was properly scored at 25 points in this case.

A. The Decision Of The Court Of Appeals In People v McDaniel, supra.

In People v McDaniel, supra., the defendant was convicted by a jury in Ingham County of first degree retail fraud and was sentenced as a habitual offender, fourth offense. The defendant had three prior felony convictions against a person or property within a five-year period. The sentencing offense was not within the same five-year period as the other three felonies. The trial court scored OV 13 at 10 points pursuant to MCL 777.43(1)(c) and (2)(a). The majority opinion of the Court of Appeals in McDaniel, supra., affirmed the trial court's scoring of OV 13 at 10 points. The Court found that the date of the sentencing offense did not have to be in the same five-year period as the three prior felonies. The Court of Appeals held as follows:

"In scoring OV 13, the court is required to score ten points where '[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person or property.' MCL 777.43(1)(c). At issue is the interpretation of the scoring instructions in subsection 43(2)(a):

> For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant asserts, without authority or analysis, that this provision required the sentencing court to examine the five-year period immediately preceding the offense. The prosecutor, on the other hand, argues that *any* five-year period may be utilized. We agree with the prosecutor's interpretation.

If the plain and ordinary meaning of the statutory language is clear, judicial construction is normally neither necessary nor permitted. *People v Philabaun*, 461 Mich 255, 261; 602 NW2d 371 (1999). Unless defined in the statute, every word or phrase of the statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *People v Disimone*, 251 Mich App 605, 610; 650 NW2d 436 (2002).

The statute clearly refers to 'a 5-year period.' The use of the indefinite article 'a' reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to 'the 5-year period immediately preceding the sentencing offense.' Instead, the phrase 'including the sentencing offense' modifies 'all crimes.' That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense.

In the case at bar, there is a five-year period in which defendant was convicted of a combination of three felonies involving crimes against both persons and property: his conviction for an October 16, 1984, unarmed robbery; his conviction for an August 4, 1988, retail fraud; and his conviction for a March 21, 1989, attempted larceny building."

People v McDaniel, supra., 171-173.

Judge Donofrio filed a dissenting opinion in People v McDaniel, supra. Judge Donofrio interpreted MCL 777.43(2)(a) to require that the sentencing offense be within the same five-year period as the three prior felonies. Judge Donofrio would have held as follows:

> "In scoring OV 13, the court is required to score ten points where '[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person or property.' MCL 777.43(c). The statute allows consideration of 'all crimes within a 5-year period, including the sentencing offense...regardless of whether the offense resulted in conviction.' MCL 777.43(2)(a).
>
> I believe that defendant was incorrectly scored under subsection MCL 777.43(c). The majority agrees with the prosecutor's interpretation of the statute and asserts that '[t]he use of the indefinite article 'a' reflects that no particular period is referred to in the statute.' I disagree. The language at issue states that 'all crimes with a 5-year period, *including the sentencing offense*, shall be counted.' MCL 777.43(2)(a) (emphasis added). Because the word 'shall' is used, I find it is impossible for any five-year period that does not include the sentencing offense to be considered. Contrary to the majority's interpretation of the statute, my reading of the statutory language clearly precludes consideration of a five-year period that does not include the sentence offense. Crimes outside the five-year period contemplated are already considered in the prior record variables.
>
> My review of defendant's criminal record does not indicate *any* three or more felonies occurring within the immediate five-year period; thus, scoring ten points was inappropriate. This scoring error resulted in an elevated guidelines recommendation. MCL 777.21(3)(c); MCL 777.66."
>
> People v McDaniel, supra., dissenting opinion of Donofrio, J., 173-174.

The defendant in People v McDaniel, supra., filed an application for leave to appeal with this Court. This Court set that case for oral argument on the defendant's application concerning the scoring of OV 13. People v McDaniel, 471 Mich 934 (2004). Pursuant to a stipulation between the parties, this Court subsequently denied the defendant's application for leave to appeal.

B. The Facts In Defendant Francisco's Case As They Relate To The Scoring Of OV 13.

Defendant Francisco was convicted by a jury of first degree home invasion and larceny in a building for crimes committed on April 4, 2003. (T-IV, 6-7). The trial court vacated the conviction of larceny in a building. (T-IV, 11-12). The Defendant acknowledged that he had been convicted of attempted felonious assault in May of 1988 and of manslaughter in May of 1987 and therefore was scheduled to be sentenced as a habitual offender, third offense. (T-IV, 10-12).

The Defendant's criminal history as it relates to the scoring of OV 13 in this case is set forth in Defendant Francisco's Offender Profile obtained from the Department of Corrections. A copy of the Defendant's Offender Profile is attached to this brief as Appendix D. The Defendant's pertinent convictions, including the dates on which the crimes occurred are as follows:

> a. Defendant convicted of three counts of manslaughter in Oakland County Circuit Court. The offenses occurred on July 26, 1986. Defendant was sentenced to a term of 3 to 15 years imprisonment, on May 11, 1987.
>
> b. Defendant convicted of attempt assault with a dangerous weapon in Branch County Circuit Court. The offense occurred on August 17, 1987. Defendant was sentenced to a term of 1 year 2 months to 2 years imprisonment on May 6, 1988.
>
> c. Defendant convicted of first degree home invasion in Oakland County Circuit Court. The offense occurred on April 4, 2003. Defendant was sentenced as a habitual offender, third offense, to a term of 8 ½ years (102 months) to 40 years imprisonment.

The Defendant's Offender Profile also indicates that the Defendant served the entire maximum 15 year sentence for his manslaughter conviction and was discharged from the Department of Corrections on April 5, 2002. One year elapsed between the date on which the Defendant was

discharged from the Department of Corrections and the date on which he committed the first degree home invasion for which he was convicted in this case.

C. The Scoring Of OV 13 In This Case And The Validity Of The Decision Of The Court Of Appeals In People v McDaniel, supra.

The Defendant's conviction of first degree home invasion requires the scoring of OV 13 of the Sentencing Guidelines. MCL 777.22(1). OV 13 is along with its scoring instructions contained in MCL 777.43. MCL 777.43 is set forth below in its entirety as follows:

> **"777.43. Offense variable 13, scoring**
>
> Sec. 43. (1) Offense Variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.....50 points
>
> *(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.....25 points*
>
> (c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(s)(*i*) to (*iii*) or section 7403(2)(a)(*I*) to (*iii*).....10 points
>
> (d) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group.....10 points
>
> (e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(*i*) to (*iii*) or section 7401(2)(a)(*i*) to (*iii*).....10 points
>
> (f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property.....5 points
>
> (g) No pattern of felonious criminal activity existed.....0 points
>
> (2) All of the following apply to scoring offense variable 13:
>
> *(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.*

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

(e) Do not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced.

(f) Do not count more than 1 crime involving the same controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substance." (Emphasis applied).

MCL 777.43.

As set forth above, OV 13 concerns a continuing pattern of criminal behavior. OV 13 calls for a scoring of 25 points if a defendant commits three or more crimes against a person within a five-year period. OV 13 provides that "...all crimes within a 5-year period, including the sentencing offense, shall be counted..." The trial court in this case scored OV 13 at 25 points based upon the Defendant's three manslaughter convictions which took place in 1986. The trial court could also have relied upon the attempt felonious assault committed by the Defendant in 1987. This Court reviews de novo the decision of a lower court concerning the interpretation of the statutory Sentencing Guidelines. People v Hegwood, 465 Mich 432; 436 (2001).

This Court has stressed that the goal of statutory construction is to give effect to the intent of the Legislature. People v Stanaway, 446 Mich 643; 658 (1994); People v Valentin, 457 Mich 1; 5 (1998). When the language of a statute is clear, this Court will enforce the statute as a written by the Legislature. People v Valentin, supra., 5. This Court will engage in statutory

construction only if a statute is susceptible to more than one interpretation. People v Valentin, supra., 5-6.

The People submit that the intent of the Legislature in drafting MCL 777.43 is clear. The Legislature wanted to increase the length of the sentences of offenders who commit three felonies against a person within a five-year period. The Legislature elected not to include language in the statute which required the three prior felonies to be committed within five years of the sentencing offense. As pointed out by the Court of Appeals in People v McDaniel, supra., 172., if the Legislature intended the result argued by the defendant, the statute would have referred to "the 5-year period immediately preceding the sentencing offense."

The facts of the instant case demonstrate the wisdom of the Legislature in not restricting the five-year period to the five years immediately preceding the sentencing offense. Defendant Francisco committed three felonies against persons in 1986. The Defendant was incarcerated for those crimes, and a subsequent felonious assault in 1987 while in prison, until April of 2002. The Legislature could anticipate that the defendant's pattern of criminal behavior would not continue while the individual was in the custody of the Department of Corrections. Accordingly, the Legislature did not restrict the five-year period contained in OV 13 to the five years immediately before the sentencing offense. Defendant Francisco's proclivity for criminal conduct was so pronounced that even his period of incarceration did not deter him from continued criminal behavior. Three months after entering the Department of Corrections, the Defendant engaged in criminal conduct which resulted in his plea of guilty to attempt assault with a dangerous weapon. The Michigan Parole Board considered the Defendant's lack of rehabilitation and required the Defendant to serve the maximum sentences for each of his convictions. The Defendant was discharged in April of 2002, and committed the sentencing offense in April of 2003. The

language utilized by the Legislature in enacting MCL 777.43(2)(a) effectuated its legislative intent that an individual under the Defendant's factual circumstances could be scored 25 points under OV 13 for a continuing pattern of criminal behavior.

Examination of other scoring instruction subsections contained in MCL 777.43 also indicates the intent of the Legislature not to restrict the five-year period set forth in MCL 777.43(2)(a). Subsections (2)(c), (2)(e) and (2)(f) all preclude the trial court from considering certain offenses in scoring OV 13. In contrast, (2)(a) contains only the requirement that the three offenses must be in "a" five-year period. This Court should not read a restriction into that subsection which the Legislature chose not to include.

Likewise, in MCL 777.50(2), the Legislature restricted a trial court from considering prior offenses committed ten or more years before the sentencing offense. The Legislature chose not to include such a restriction to the five-year period contained in 777.43(2)(a). The omission of a provision from one section of a statute that is included in another section of the statute should be considered an intentional act by the Legislature. Farrington v Total Petroleum, 442 Mich 201; 210 (1993); People v Belanger, 227 Mich App 637; 646 (1998). This Court should not impose a restriction upon the five-year period set forth in OV 13 when the Legislature chose not to include such a restriction.

D. Conclusion

The Legislature intentionally enacted MCL 777.43 with no restriction that the five-year period in which a defendant committed three felonies include the date of the sentencing offense. The Court of Appeals gave plain meaning to the language contained in OV 13 and reached the correct legal result in People v McDaniel, supra. The facts of the instant case demonstrate why the Legislature did not restrict the five-year period which could be utilized to establish a

continuing pattern of criminal behavior. This Court should likewise give plain meaning to the language of MCL 777.43(2)(a), cite People v McDaniel, supra., with approval and affirm the trial court's scoring of OV 13 in this case.

II. ANY ERROR IN THE SCORING OF OFFENSE VARIABLE 13 WAS HARMLESS IN NATURE AND A RESENTENCING IS UNNECESSARY BECAUSE THE MINIMUM SENTENCE IMPOSED BY THE TRIAL COURT WAS "WITHIN THE APPROPRIATE GUIDELINES SENTENCING RANGE" WITHIN THE MEANING OF MCL 769.34(10).

The Defendant argues that if this Court determines that OV 13 was scored incorrectly that this Court should order a resentencing in this case. The People submit that under the facts of this case, any error in the scoring of OV 13 was harmless in nature. **The standard of review for this issue is that a preserved nonconstitutional error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. People v Whittaker, 465 Mich 422; 426-427 (2001); People v Lukity, 460 Mich 484; 495-496 (1999).** The People submit that the record in this case establishes that if OV 13 was miscored, that error was not outcome determinative as to the Defendant's sentence.

The trial court scored OV 13 at 25 points because the Defendant's criminal history established that the Defendant committed at least three (in fact four) offenses against a person in a five-year period. With OV 13 scored at 25 points, the range for the Defendant's minimum sentence was from 87 to 217 months. The trial court sentenced the Defendant to a term of 102 months to 40 years imprisonment. The Defendant's minimum sentence was, therefore, at the low end, but not at the bottom, of the range set by the Sentencing Guidelines.

If OV 13 was scored at 0 points, the range for the Defendant's minimum sentence would be from 78 to 195 months. The Defendant's initial minimum sentence of 102 months would still be at the lower end of the range set by the Sentencing Guidelines and should therefore be affirmed. MCL 769.34(10); People v Garza, 469 Mich 431; 435 (2003). MCL 769.34(10) reads in part as follows:

> "(10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error, in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."
>
> MCL 769.34(10).

As set forth above, MCL 769.34(10) requires that a defendant's minimum sentence should be affirmed if it falls within the range set by the Sentencing Guidelines. The Defendant's minimum sentence in this case, even with OV 13 scored at 0 points, still falls within the lower range required by the Sentencing Guidelines and therefore should be affirmed by this Court.

The fact than MCL 769.34(10) also contains the language "absent an error in scoring the sentencing guidelines" does not mandate a resentencing if this Court finds that OV 13 was scored incorrectly. This Court still must determine if, but for the scoring error, the trial court would have imposed a different sentence. The People submit that the fact that the trial court sentenced the Defendant at the lower end, but not at the bottom, of the range set by the Sentencing Guidelines indicates that the trial court selected a length of time, 8 ½ years, that the Defendant should receive as a minimum sentence. There is no indication in the record that the trial court would have sentenced the Defendant to a lesser sentence within the range set by the Sentencing Guidelines if OV were scored at 0 points. If this Court is not convinced based upon the existing record that the trial court would impose the identical sentence, this Court should remand this case to the trial court for a determination of that question by the trial court.

The Defendant's sentence should be affirmed by this Court because the Defendant's minimum sentence of 102 months is within the range called for by the Sentencing Guidelines whether OV 13 is scored at 25 points or 0 points. MCL 769.34(10); People v Garza, supra., 435.

Any error in the scoring of OV 13 was not outcome determinative of the Defendant's sentence and, therefore, this Court should not order a resentencing in this case.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Robert C. Williams, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to deny the Defendant-Appellant's Application For Leave To Appeal.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: Robert C. Williams
ROBERT C. WILLIAMS (P22365)
Assistant Prosecuting Attorney

DATED: December 29, 2005

APPENDIX A

Order

Michigan Supreme Court
Lansing, Michigan

December 7, 2005

129035

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 129035
COA: 252188
Oakland CC: 03-189882-FH

CHARLES WAYNE FRANCISCO,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the May 26, 2005 judgment of the Court of Appeals is considered, and we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs by January 5, 2006, addressing: (1) whether *People v McDaniel*, 256 Mich App 165, 172-173 (2003), was correct in deciding that OV 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense, and (2) assuming OV 13 should not have been scored, is defendant automatically entitled to resentencing because of the scoring error, or is resentencing unnecessary because the minimum sentence imposed was "within the appropriate guidelines sentence range" within the meaning of MCL 769.34(10).

We further order the Oakland Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court.

t1206

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 7, 2005

Corbin R. Davis
Clerk

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WAYNE FRANCISCO,

Defendant-Appellant.

UNPUBLISHED
May 26, 2005

No. 252188
Oakland Circuit Court
LC No. 03-189882 FH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

The jury convicted defendant of first-degree home invasion, MCL 750.110a(2). He and a codefendant had separate juries. The court sentenced defendant to 8.5 to 40 years as a habitual offender who committed a third offense. MCL 769.11. He appeals as of right and we affirm.

I. FACTS

Defendant was tried along with co-defendant Chris Bernier, Jr. before separate juries. On April 4, 2003, defendant and Bernier entered the trailer of Joanne Oritz wearing masks and dark clothing. One of the men had a gun and threatened to kill Oritz and her two acquaintances if they did not sit down. Defendant and Bernier then took two purses from the women and left. Police later found a card bearing Oritz's name in defendant's back pocket.

II. JUROR VOIR DIRE

Defendant claims that the trial court erred in its allegedly inadequate voir dire of a juror who once worked for the court as a probation officer. We disagree.

A. Standard of Review

Whether the trial court conducted a sufficiently probing voir dire to uncover potential juror bias is reviewed for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 609; 518 NW2d 441 (1994) "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so [c]hallenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.* at

A trial court has considerable discretion in both the scope and conduct of voir dire. MCR 6.412(C). A defendant has no right to specific measures affecting the scope and conduct of voir dire, such as allowing counsel to ask the questions or sequestering individual jurors. *Id.* But a court does abuse its discretion if it conducts voir dire in a manner that does not adequately question jurors about potential bias such that a defendant may not intelligently exercise challenges for cause and peremptory challenges. *Id.* Such was not the case here.

B. Analysis

Defendant's argument that the voir dire was inadequate is unpersuasive because his reliance on *Tyburski* is misplaced. Several important facts distinguish that case. *Tyburski* was a high-profile murder trial subject to extensive media coverage, which gave the court "a duty to exercise caution in the manner it conducted voir dire." *Id.* at 624. All but two of the thirty-seven potential jurors called for questioning admitted exposure to the media coverage, as did eleven of the twelve who decided the case. *Id.* at 612 n 1. The court denied the defendant's motion for individual sequestered voir dire and a probing questionnaire for all prospective jurors, stating that it conducts its own voir dire for all its trials. *Id.* at 611. The court did not allow the attorneys to ask follow-up questions other than specific written ones that the court would submit. *Id.* It deemed some of the written questions irrelevant and did not ask them. *Id.* at 616-617. The Court characterized as "subtle admonishment" some of the trial court's reaction to jurors who admitted bias. *Id.* at 612.

In contrast, no publicity surrounded defendant's trial. Defendant was allowed to pose questions to potential jurors. The court did not deem any of defendant's questions irrelevant and did not refuse to submit any of them. While it did cut off questioning for cause, it did so after defendant conceded that his argument for cause due to bias lacked merit. Finally, the court did not subtly admonish prospective jurors for anything. The juror twice stated that she could put her work experience as a probation officer behind her and be fair and impartial. Defendant was allowed to query her about some details of her employment history. Finally, defendant challenges the voir dire of one juror, not the whole pool as in *Tyburski*. Defendant here cannot fairly show that the court did not allow him to intelligently use his challenges.

The court also did not err when it denied defendant's request for additional peremptory challenges. This Court reviews a denial of a request for additional peremptory challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). MCR 6.412(E)(2) gives the court discretion to grant additional peremptory challenges on a showing of "good cause." According to the staff comment, the rule is based on 3 ABA Standards for Criminal Justice (2d ed), Standard 15-2.6(a), which allows allocating additional challenges "when special circumstances justify doing so."

The record does not support a finding of either good cause or special circumstances. Again, no special publicity surrounded this case. See *People v King*, 215 Mich App 310; 544 NW2d 765 (1996) (upholding denial of more peremptory challenges in case where publicity was not unfairly biased and where biased jurors were dismissed for cause). No particular reason other than the fact that the juror was once a probation officer alarmed defendant. Nothing she said indicated any bias and she disavowed bias twice. Defendant had no right to another peremptory challenge and the court did not abuse its discretion in refusing to give him one.

III. CODEFENDANT TESTIMONY

Defendant also argues that the court erred when it did not exclude from his jury the testimony of his codefendant's witnesses, specifically codefendant's sister and father.

A. Standard of Review

Defendant had a separate jury and the issues presented to this Court involve both severance and a challenge to the admission of evidence. Inherent to the issue of severance is what evidence to allow before a defendant's jury. Either way, the standard of review for both severance and admission of evidence is abuse of discretion. *Koester v Novi*, 213 Mich App 653, 663; 540 NW2d 765 (1995) (admission of evidence); *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994) (severance).

B. Analysis

Hana sets out the necessary framework for considering defendant's claim of error. Though defendant was granted a separate jury, he objects to it hearing the testimony of co-defendant's witnesses. According to *Hana*:

> [I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials . . . . While [a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence, . . . a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant. [*Hana, supra* at 350 (quotation, citation omitted).]

The court noted that "spillover prejudice" inherent in every multiple defendant trial is not sufficient to warrant severance. *Id.* at 349. Instead, antagonistic defenses must be mutually exclusive such that "if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant." *Id.* at 350. Such a scenario does not exist in this case. Furthermore, the Court in *Hana* concluded that the defendant failed to show the violation of any rights where his jury was not "exposed to evidence that would have been barred from their consideration in separate trials." *Id.* at 360. Here, defendant does not contend that the testimony of his codefendant and his codefendant's sister and father was inadmissible.

The prejudice defendant claims is of the spillover variety. For example, he argues that his codefendant implied that defendant was guilty and that the fact of his testimony was prejudicial because defendant did not testify and juries want to hear from defendants. Most defendants in a multiple defendant trial could claim this kind of prejudice. The law requires more, which defendant cannot show. Defendant and codefendant both rested their defenses on theories of identification. Both defendants denied culpability but neither defendant accused the other and therefore, their defenses were not mutually exclusive. Furthermore, the court repeatedly and at different stages of trial instructed both juries only to consider only the evidence

as it related to their defendant. Absent a contrary showing, jurors are presumed to follow the court's instructions. See, e.g., *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). The court did not err in denying defendant's request to exclude from his jury codefendant's witnesses.

IV. SENTENCING

Finally, defendant challenges his sentence. Specifically, he disagrees with how two offense variables were scored.

A. Standard of Review

Interpretation of how the sentencing statutes apply to defendant is a question of law that this Court reviews de novo. *People v Kimble,* 470 Mich 305, 308-309; 684 NW2d 669 (2004).

B. Analysis

Defendant maintains that insufficient evidence supported a finding of multiple victims. MCL 777.39(1) requires a score of ten for OV 9 if there were 2 to 9 victims. A victim is a person placed in danger of injury or loss of life. MCL 777.39(2)(a). Sufficient evidence supported the court's finding that there were at least two victims. Joanne Ortiz testified that the two men acted in concert when they entered the trailer and one pointed a handgun at her. He threatened to kill her if she didn't sit down. Sheila Mendoza and Rhonda Farmer were also present. The men took Ortiz and Farmer's purses. Mendoza also testified that one of the men threatened to hurt or kill the women present. She believed that one of the men carried a gun based on his body language though she did not actually see a gun. One of them threw a piece of crystal in the direction of Farmer and her, though no one was hit. The jury found beyond a reasonable doubt that defendant was one of the men.

The testimonial evidence provided sufficient basis for a score of ten points for OV 9. Three persons were verbally threatened with death or physical injury. The men were armed with a handgun. The crystal was another weapon that placed at least two of those present in danger of injury. Finally, the confined space of the scene of the crime, a trailer with only one exit with steps, and the nature of the crime of home invasion inherently put everyone inside the trailer at risk of death or injury, whether it came from a fired bullet or a flung piece of crystal.

Defendant's argument for OV 13 is also unavailing. OV 13 scores points for a continuing pattern of criminal behavior. MCL 777.43. Defendant received under MCL 777.43(1)(b) a score of twenty-five points for a pattern of crime involving three or more crimes against a person. He was convicted of three counts of manslaughter in 1986. The issue on appeal is whether those three convictions should count as part of a continuing pattern. Time is the relevant consideration. According to MCL 777.43(2)(a):

> For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant says that the statute requires that his past felony convictions must have occurred within five years of his present home invasion offense. The prosecution's position is that the statute authorizes the scoring of points for crimes committed during any five-year period.

Case law settles this question in favor of the prosecution. According to this Court:

> The statute clearly refers to "a 5-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense. [*People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2002) (emphasis in original).]

Like defendant in this case, the defendant in *McDaniel* had three convictions from the 1980s that factored into his sentencing though his current offense happened many years later. *Id.* at 173. Though *McDaniel* involved past crimes that happened separately and were crimes against property and not persons as in this case, these factual distinctions do not require or even allow a different legal outcome. Simple application of *McDaniel* required the trial court to score twenty-five for OV 13.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

APPENDIX C

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 129035

Court of Appeals
No. 252188

Circuit Court
No. 03-189882-FH

-vs-

CHARLES WAYNE FRANCISCO,

Defendant-Appellant.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Laurie Wakerley, being duly sworn, deposes and says that on the 28th day of December, 2005, she served a copy of Appellee's Supplemental Brief In Opposition To Application For Leave To Appeal, upon Jacqueline J. McCann, State Appellate Defender Office, attorney for Defendant, at 645 Griswold, Suite 3300 Penobscot, Detroit, MI 48226, by depositing same in an envelope with the Oakland County mailing pick-up service.

Further deponent saith not.

Laurie Wakerley
LAURIE WAKERLEY, Deponent

Subscribed and sworn to before me,
this 28th day of December, 2005.

Michelle Renee Leismer
MICHELLE RENEE LEISMER, Notary Public
Oakland County, Michigan
In the County of: Oakland
My Commission Expires: 03/29/11